2013

The Resource Page (2013) 49 Page 120

The Resource Page

NEW ETHICS OPINIONS

Judge's Use of Electronic Social Networking Media
ABA Formal Opinion 462
http://goo.gl/qipo8

Can a judge be a Facebook friend with an attorney who appears before the judge? That question has resulted in conflicting ethics opinions. The Florida Judicial Ethics Committee concluded that a lawyer should not be a Facebook friend of a judge because the public identification of a lawyer as a "friend" of the judge "conveys the impression that the lawyer is in a position to influence the judge." Florida Advisory Op. 2009-20 (http://goo.gl/22Zkd). Similarly, a California ethics committee concluded that a judge may not have a social-networking relationship with an attorney while that attorney has a case pending before the judge. Calif. Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (http://goo.gl/ytuUh). But other state ethics opinions have not been so restrictive:

- A New York advisory committee noted that a judge "generally may socialize in person with attorneys who appear in the judge's court," so using technology to do so shouldn't create an ethics violation for the judge. Even so, the committee cautioned that the public nature of these online friendships might create the appearance of a particularly strong bond and thus require recusal. N.Y. Advisory Op. 08-176 (2009) (http://goo.gl/RPBkE).
- A Kentucky advisory committee urged judges to be "extremely cautious" and noted that several judges who had initially joined social-networking sites had since limited or ended their participation. But the committee concluded that a judge could ethically be a Facebook friend with persons who appeared in court, including attorneys, social workers, and law-enforcement personnel. Ky. Advisory Op. JE-119 (2010) (http://goo.gl/wgC49).
- A South Carolina advisory committee concluded that a judge could be a Facebook friend with law-enforcement officers so long as they didn't discuss anything related to the judge's position in the online communications. S.C. Advisory Op. 17-2009 (2009) (http://goo.gl/KjMf3).

The American Bar Association has now waded into this thicket with a formal ethics opinion on the judicial use of social-networking media, including Facebook. The ABA's conclusion—judges may participate in the social-networking world, just as they can have in-person relationships, but ethics rules still must be considered.

The ABA opinion provides a roadmap to the judicial-ethics rules (as found in the ABA Model Code of Judicial Conduct) that should guide a judge in the social-networking world:

- Rule 1.2 provides that a judge "shall avoid . . . the appearance of impropriety" and "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Based on this rule, the ABA opinion cautions "that the judge be sensitive to the appearance of relationships with others," including online relationships. As the opinion notes, electronic messages, images, and information—once created—may be electronically transmitted without the judge's permission to unintended recipients.
- Rule 2.4(C) provides that "[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." The ABA opinion cautions judges not to "form relationships" online that may convey such an impression.
- Rule 2.9 prohibits ex parte communications about pending or impending matters except as otherwise authorized by law. Rule 2.10 prohibits a judge from making "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." And Rule 3.10 provides that a judge "shall not practice law" and may not give legal advice except to members of the judge's immediate family. The ABA opinion concludes that "[a] judge should avoid comment about a pending or impending matter in any court," should "avoid using any [electronic social-media] site to obtain information regarding a matter before the judge," and should "take care not to offer legal advice" while on social-media sites.
- Rule 2.11 provides that a judge "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "has a personal bias or prejudice concerning . . . a party's lawyer." The rule also provides that a judge subject to disqualification "other than for bias or prejudice" against a party or lawyer "may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive the disqualification." The ABA opinion concludes that "whenever matters before the court involve persons the judge knows or has a connection with professionally or personally," the judge "should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for disqualification." As an example, the opinion suggests that "a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an [electronic social-media] connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification."

For judges in states in which no ethics opinions have yet been rendered on judicial use of electronic social media, the ABA opinion provides an excellent starting point for analysis. A cautious judge might also want to review the Florida and California opinions.